Research Monograph

On

“ Prevent detention in Bangladesh perspective : Whether Violation of Fundamental Rights or Safeguard to our Sovereignty ”.

This Research Submitted for the partial fulfillment of the award of the degree inLLB (Hon’s) Department of Law Sonargaon University (SU), Dhaka.

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Letter of Transmittal

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Subject: Submission of Research Monograph on "Prevent detention in Bangladesh perspective : Whether Violation of Fundamental Rights or Safeguard to our Sovereignty".

Dear Sir,

I do herby please to submit the Research Monograph on the topic "Prevent detention in Bangladesh perspective : Whether Violation of Fundamental Rights or Safeguard to our Sovereignty". It is a great pleasure to work on such important topic. This Research work has been done according to the requirements of the Sonargaon University for the fulfillment of my LL.B (Hon's) years course under the Department of Law.

I respectfully acknowledge your guidance, leadership and help for the preparation of this paper. It is worthwhile to mention that there might be some errors and mistakes in my report due to limited time and knowledge. I am still at learning stage. So I respect that you will pardon my unintentional mistakes in preparing this paper.

Sincerely. Yours,

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Solemn Affirmation

I do thereby solemnly declare that the work presented in this research has been carried out by me and has not been previously submitted to other University/College/Organization for any academic qualification, publication or a personal Degree. I hereby ensure that the work presentedhere not breach any existing copyright.

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Guide Certificate

This is to certified that the Research Monograph on **"Prevent detention in Bangladesh perspective : Whether Violation of Fundamental Rights or Safeguard to our Sovereignty"** is prepared by Mst. Nadira Sultana, ID No.: LL.B 1803015007 for partial fulfillment of the requirement of the Program: LL.B (Hon's) from Sonargaon University, Dhaka. It also certified that the research work has been carried out under my supervision and intensive guidance.

It is to be certified that this research work is original and suitable in its style and contents for submission and fulfillment of his LL.B (Hon's).

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I express my sincerest gratefulness to Almighty **"Allah"** for his kindness on me in accomplishing this research monograph. I express my heart-string gratitude to my "Honorable" and distinguished cooperative supervisor **Abdul Alim,** Lecturer, Department of Law, Sonargaon University (SU), Dhaka who inspirit and guide me throughout the work. He provide me resources that I needed to carry out the work and gave me important guidelines whenever I was in a Dilemma.

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Thank you.

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Abstract

Bangladesh is one of the few countries in the world which allows preventive detention even during non-emergency periods. Since Independence preventive detention has been the most used tool in case of violation of Human Rights. Irrespective of any forms of government which has been in power in Bangladesh, has used this as a mean of political exploitation. Each of them have failed miserably to stop the endemic problem regarding preventive detention. However, this is against the spirit of our constitution, democracy and the rule of law. Despite various legal safeguards against preventive detention, the practice of malicious preventive detention is rampant in Bangladesh.

The study aims to show how the rights are violated through preventive detention and how the legal authorities are abusing their powers. In my research I want to highlight the definition and scope of preventive detention, its historical development, its nature and our constitutional safeguards for it. I will also highlight why preventive detention is a necessary evil for our country. I will cite the leading cases relating to preventive detention in Bangladesh and while emphasizing on the recommendations given by the Supreme Court. And lastly I will also give my recommendation on how we can put chains on this blackest of the black laws.

The Constitution of Bangladesh ensures the equal rights and status of women in public life. But nondiscrimination over women in the private sphere is not guaranteed. Consequently, there are significant disparities between men and women in all realms of life. Lack of equal access to economic opportunities, education, health services and their lesser role in decision making perpetuate women's subordination to men and susceptibility to violence. The notion of the society about girl children within the family itself builds up a mindset that girls ought to be less important than the male children. The multiple forms of discrimination against girls begin at home and continue to the end of their lives. This imbalanced foundation of knowledge, fully biased in favour of the males of the family, spreads through the society in general, resulting in tremendous forms of violence and injustice to women as a whole. The article highlights the key reasons of oppression over women such as physical, sexual and psychological abuse that cuts across lines of income, class and culture and its ultimate consequences. This article evaluates the loopholes in the existing criminal justice system of Bangladesh concerning violence against women with mentioning necessary possible way outs.

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CHAPTER 1

INTRODUCTORY CHAPTER

1.1 Introduction

Bangladesh is one of the few countries in the world where laws allowing preventive detention enjoy constitutional validity even during peacetime. In contrast, the European Court of Human Rights has long held that such laws are illegal under the European Convention on Human Rights regardless of the safeguards inherent in them to prevent their misuse.

Preventive detention means detention of a person without trial and without conviction by a court, but merely on suspicion in the minds of the executive authority. In A.K. Gopalan vs. State of Madras[1], it was held that there is no authoritative definition of Preventive Detention. The word "Preventive" means that restrain, whose object is to prevent probable or possible activity, which is apprehended from a would be detune on ground of his past activities;

"Detention" means keeping back[2] Preventive detention means detention of a person only on suspicion in the mind of the executive authority without trail, without conviction by the court. The detention, aim of which is to prevent a person from doing something which is likely to endanger the public peace or safety or causing public disorder. Preventive detention is an abnormal measure whereby the executive is authorized to impose restrain upon the liberally of a man who may not have committed a crime but who it is apprehended, is about to commit acts that are prejudicial to the public safety etc.

As David H. Bayley[3] said "A law of Preventive detention sanctions the confinement of individuals in order to prevent them from engaging in forms of activity considered injurious to the community and the like hood of which is indicated by there past action''

[1] AIR 1950 SC 27
[2] Alamgir v.the state AIR 1957 At page 285
[3] Sunil Kumar Sammaddar vs. Superintendent of Huagly Jail 75 Cal WN 151

1.2 Statement of the problem

Preventive detention will bring back shadow criminal justice system

The claim of personal liberty being the essence of a free society, almost all every civilized country has constitutionally protected its citizens from the excesses of the coercive apparatus of state. Bangladesh is not an exception.

Among the national institutions, the legislature always comes in the forefront of the national systems for the protection of the rights of a person arbitrary arrested and detained.

One of the main function of the legislature is to enact laws in protecting human rights of the arbitrary arrested persons because arrested and detained persons are considered as innocent until proved their guilt beyond reasonable doubt.

Preventive detention is a peculiar measure in the sense that it imposes restrictions on the liberty of a citizen to the extent that a person who has not committed any offence may be presumed that he is about to commit an offence, which has been defined as prejudicial.
As David H. Bayley said: "A law of preventive detention sanctions the confinement of individuals in order to prevent them from engaging in forms of activity considered injurious to the community and the likelihood of which is indicated by their past actions" [4]

In Bangladesh, most of the developing countries, the laws regarding Preventive Detention has been used as a weapon to dominate, crash the opposition and to perpetuate rule. After achieving our independence, there are no situations of war or internal aggression or internal disturbance which are threatening our security but Art. 33, The Special Powers Act, 1974 and Emergency Power Rule-2007 are still being used to suppress anti-government movement and sometimes democratic movement also.[5]

Preventive detention**,** the practice of incarcerating accused individuals before trial on the assumption that their release would not be in the best interest of society specifically, that they would be likely to commit additional crimes if they were released.[6]

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[4] Hassan arif 1997and "The Judiciary as a Bulwark against Illegal Detention", and Public Interest Litigation in South Asia: Rights in Search of Remedies, Dhaka,at p. 143

[5] http://bdjls.org/research-monograph-preventive-detention-and-violation-of-human-rights-bangladesh-perspective/5/

[6] https://global.britannica.com/topic/preventive-detention

1.3 Question

1. What are the Nature and Justification of Preventive Detention?

2. What are the laws relating to preventive detention in Bangladesh and what is the constitutional safeguard?

3. What are the judicial remedies against Preventive Detention?

1.4 Objectives of the study

The aims and objectives of the study are as follows-

1. To read out the constitutional as well as the judicial safeguards of preventive detention in Bangladesh.
2. To make recommendations to improve the current preventive detention process in Bangladesh.
3. To point out suggestions to reform the laws related to preventive detention.
4. To illustrate how the various legal guarantees are enforced in practice in order to protect the rights of detained persons.
5. To show the violation of human rights by the abuse of preventive detention in Bangladesh.
6. To find out the problems faced in the preventive detention process in Bangladesh.

1.5 Scope of the study and limitation

In this study firstly, makes an essay to substantiate the proper knowledge about preventive detention, arbitrary arrest by law enforcing agency and violation of human rights. Secondly, the present study makes an analysis on laws related to preventive detention. Thirdly, the present study gives an outline and makes a critical evolution of the existing law regarding preventive detention in criminal justice system in Bangladesh. Finally, the study makes a humble effort to draw some suggestions, arrived at the conclusion of the present study.

The present study is undertaken as part of fulfilment of the requirements of LLB degree. I gets only one month to complete the research. Therefore, there is not much scope for doing a comprehensive study. Yet, I try my best to fulfil the objectives set out in the present study.

1.6 Methodology

This methodology is qualitative in nature. Content analysis method has been applied in this report. Research method of documentary analysis or content analysis has used which has helped me to focus the concept of preventive detention in existing laws and to find out the demerits of the present preventive detention system in Bangladesh.

1.7 Literature review

For the purpose of the study, relevant judicial decisions have been collected from various sources and analysed to identify the main propensity on the issue. The study has also reviewed the existing legal framework on arrest, detention and torture under existing laws of Bangladesh. My research monograph is totally based on the books, articles, and journals, newspaper reports.

In my research monograph I take help from statutory provisions, case laws, website, international journals and the help from my supervisor. The legislation governing the administration and management of the preventive detention in Bangladesh is calculated as The Special Powers Act -1974, The Code of Criminal Procedure -1898, The Emergency Power Rule -2007 and Article-33 of the Constitution of Bangladesh. I have also scrutinized other countries preventive detention laws to enrich the study.

CHAPTER 2

CONCEPT ABOUT PREVENTIVE DETENTION

2.1 definition of preventive detention

The holding of someone in jail or in an institution because he or she is regarded as a danger to the community [7]

Preventive detention is an imprisonment that is putatively justified for non-punitive purposes.[8]

Normal1y preventive detention is resorted to against enemy aliens in emergencies such as war when the evidence in possession of the detaining authority is not sufficient to secure the immediate conviction of the detention by the normal legal process. In India the history of preventive detention dates back to the early days of the British rule when under the Bengal Regulation— III of 1818 (the Bengal State Prisoners Regulation) the government was empowered to detain anybody on mere suspicion. There was also Rule 26 of the Rules framed under the Defence of India Act 1939, again a war time legislation, which allowed the detention of a person if it was "satisfied with respect to that particular person that such detention was necessary to prevent him from acting in any manner prejudicial" to the defence and safety of the country[9]

Preventive detention is a special form of imprisonment. Most persons held in preventive detention are criminal defendants, but state and federal laws also authorize the preventive detention of persons who have not been accused of crimes, such as certain mentally ill persons.

Preventive Detention is the holding of someone in jail or in an institution because he or she is regarded as a danger to the community.

The practice of incarcerating accused individuals before trial on the assumption that their release would not be in the best interest of society-specifically, that they would be likely to commit additional crimes if they were released. Preventive detention is also used when the release of the accused is felt to be detrimental to the state's ability to carry out its

[7] http://www.dictionary.com/browse/preventive-detention

[8] https://en.wikipedia.org/wiki/Preventive_detention

[9] (Emp. vs. Sibnath A. 1945 P.C.l56).

investigation. In some countries the practice has been attacked as a denial of certain fundamental rights of the accused.

Preventive detention**,** the practice of incarcerating accused individuals before trial on the assumption that their release would not be in the best interest of society specifically, that they would be likely to commit additional crimes if they were released. Preventive detention is also used when the release of the accused is felt to be detrimental to the state's ability to carry out its investigation. In some countries the practice has been attacked as a denial of certain fundamental rights of the accused.

2.2 Nature and justification of preventive detention

In each matter, there is nature and justification behind it. The nature of Preventive detention is different from the nature of punitive detention.

The word Preventive detention is used in contradiction to the word punitive detention.[10] Few people have described both actions as restraint of individual's freedom and personal liberty.

On the other hand, the philosophy lying behind the preventive detention is the greater interest and security of the state and nation because National Security is more important than the personal liberally of citizen. Justifying the measure Lord Atkinson in R. vs. Halliday said, ''where preventive justice is put in force some sufferings and inconveniences may be caused to the suspected persons. This is inevitable but the suffering is inflicted for something much more important than his liberty or convenience, namely for securing the public safety and the defence of the realm".In the same case Lord Finlay has said, "Any preventive measure even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the state"[19].

When a person comes within the satisfaction of the government authority that a person is going to commit prejudicial acts, he may be detained by Preventive detention to defend him from doing that act. In Sasti vs. State of West Bengal, Indian Supreme Court

[10] Feldman, D. (1993) "*Civil Liberties and Human rights in England and Wales*", Oxford Publications P. 169

elucidated the nature of Preventive detention as a detention of a person without trial in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge or to secure the conviction of the detune by legal proof but may still be sufficient to justify his detention[11].

Similar view also expressed by Lord Alfred Denning. He said, "If there are traitor in our midst, we cannot afford to wait until we catch then in the act of blowing up our bridges or giving our military secrets to the enemy, we cannot run the risk of living then at large, we must detention then suspicion".

Regarding preventive detention the Indian Supreme Court observed, "That appears to have been done because the constitutions recognize the necessity of preventive detention on extraordinary occasion when control over public order, security of the country, etc., are in danger of breakdown. But while recognizing the need of preventive detention without recourse to the normal procedure according to law, it provided at the same time certain restrictions on the power of detention, both legislative and executive, which it considers as minimum safeguards to ensure that the power of such detention is not illegitimately or arbitrary used"[12]

2.3 History of preventive detention

the word Preventive detention was used in Britain first time in a case[13]. Preventive detention was first introduced in our sub-continent in 1818 by the Bengal State Prisoners Registration iii.

In India the Preventive detention was enacted in 1950 as named "Preventive Detention Act, 1950". Afterward it was amended and replaced by Maintenance of Internal Security Act, (MISA) 1971.

Preventive detention also introduced by Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA) 1974, National Security Act 1980, The Essential Services

[11] Sasti vs. State of West Bengal

[12] *Pankaj Kumar vs. State of West Bengal,* AIR (1970) SC 97.

[13] R. vs. Halliday

Maintenance Act (EMS) 1981, and lastly by the Terrorist and Disruptive Activities (Prevention) Act 1985.

The Indian Constitution empowers the parliament to legislate on preventive subject to limitation laid down by Article 22 [14].

In Pakistan through Public Safety Ordinance Act 1949 10, Public Safety Act (Amendment) 195011, Public Safety Ordinance 1952 and lastly The Security of Pakistan Act 195212 were provided Preventive detention in various ways.

The constitution of Pakistan of 1956 and 1962 empowered and also constitution of 1973 empowered parliament of Pakistan to enact Preventive detention laws. In Bangladesh the original constitution, there was no provision introducing for Preventive detention. But through 4th amendment by "The Special Powers Act 1974" (9thFebruary) enacted Preventive detention act which was an anti-people black law still continuing. After enacting the provision by the Special Powers Act, Sheikh Mujibur Rahman used Preventive detention against the tribal people of Chittagong Hill Tracts, and against the suspected members of Jatio Shomajtantirik Dol and Shorbohara Party. President Ershad govt. used this Preventive detention against Awami League and BNP during his regime (1982-90). But unfortunately two elected party BNP Govt. (1991-95) and Awami League Govt. (1996-2001) used it to oppress the opposite party severely.

2.4 Preventive detention in Bangladesh & constitutional safeguards

In our constitution Article 33 deals with the rights of an arrested person. Article 33 confers three constitutional rights or safeguards upon a person arrested. Sub article (1) and (2) deals with:

• He or she cannot detain in custody without being informed, as soon as may be of the grounds of his arrest.

• He or she has the right to be produced before the nearest magistrate within 24 hours and cannot detain in custody beyond the period of 24 hours without authority of the magistrate.

[14] Halim abdul, (1998) "*Constitution, constitutional law and politic: Bangladesh Perspective*" Dhaka at p-258

• He or she has the rights to consult and be defended by a legal practitioner of his choice and-

Sub article (3), (4), (5), (6) deals with three constitutional safeguards for detention. They are:

1. Review by an Advisory Board.
2. Right to communication of grounds of detention.
3. Right of fight against the detention.

2.4.1. REVIEW BY AN ADVISORY BOARD:

No law providing for preventive detention shall have any authority of detention of a person for a period exceeding six months unless an Advisory Board consisting of three persons, of whom two shall be person who are, or have been or are qualified to be appointed as, judges of the Supreme Court and the other shall be a person who is a senior officer in service of the republic[15]. No person can be detained more than 6 months without authority of the Advisory Board, if the board gives its opinion that, there is sufficient grounds for such detention only than the authority can detain the suspect more than 6 months. If the grounds of detention are not placed before the Advisory Board within 120 days from the date of detention, the detention will be illegal[16]. The opinion of the majority of the Advisory Board shall be deemed as an opinion of the board if there is a difference opinion among the members.

2.4.2. RIGHTS TO COMMUNICATION OF GROUNDS OF DETENTION:

Article 33(5) of our constitution and also in Indian constitution Article 22(5), in Pakistan constitution Article 33(5) says that the detaining authority must communicate as soon as may be to the detune about the grounds of detention. "As soon as" means a reasonable time. According to the Special Powers Act the grounds must be communicated within 5 days from the date of detention[17]. Where the person arrested in illiterate, the grounds may be communicated to him verbally. Where he is literate, they are to be made in the language, which the detune could understand.

[15] Section 33(4) and 9 of The Special Powers Act 1974.
[16] Sayedur Rahman Khalifa vs. Secretary Home Affairs, 6 BLD (1986) DB 272
[17] Nazir Ali vs. Secretary Home Affairs 10 BLD (1990) HCD 258

3. RIGHTS OF REPRESENTATION AGAINST THE ORDER OF DETENTION:

It is the rights of the arrested person to engage counsel and the consul will help the person to defend him. Article 33(1) of our constitution provides that the detaining authority must afford the detune the earliest opportunity of making representation against his detention. The person arrested has a right to have purposeful interview with the legal practitioner out of the hearing of the police or jail stuff through it may be within their presence.

2.5 Judicial control-satisfaction of detaining authority

The question of a person being detained under the law of preventive detention is left to be determined upon the subjective satisfaction of the detaining authority. This satisfaction is a matter into the existence of which the courts will not set on foot any inquiry unless it is alleged that the order of detention is a mala fide one.[18] As the High Court in the case of Ranabir Das vs. Ministry of Home Observer, "A detention order is made mala fide when it is made contrary to the object and purpose of the Act or when the detaining authority permits him to be influenced by conditions which he ought not to permit".[19] In the case of Habibullah Khan vs. S.A. Ahmed the Appellate Division held that it is not only that the government is satisfied that the detention is necessary, but it is also for the court to be satisfied that the detention is necessary in the public interest.[20] In Krishna Gopal vs. Govt. of Bangladesh, the Appellate Division held that an order which is going to deprive a man of personal liberty cannot be allowed to be dealt with in a careless manner, and if it is done so, the court will be justified in interfering with such order. The court held the detention order unlawfully.[21]

[18] Section 34 of The Special Powers Act, 1974
[19] 28 DLR (1976) p-53
[20] 35 DLR (AD) (1983) p-78
[21] 31 DLR (AD) (1979) p-149

2.6 Rule of law

The Act provides for indefinite periods of detention ranging on different intervals without effective safeguards. This arbitrary and malicious exercise of discretion of the government is grossly against the doctrine of rule of law. District Magistrate or Additional District Magistrate can initially issue detention order for 30 days. Later, it can be extended by the approval of the Government. In this respect, the Ministry of Home Affairs plays a vital role. Under this Act, the detainee is not produced in a Court and he/she is deprived to defend him/herself by any legal practitioner. This is a denial of the Constitutional safeguards of arrested and detained person who is not produced, as per the provision of this Act, to the nearest Magistrate within 24 hours from the time of his arrest. So this Act has been described by Gazi Muhammad Shahjahan MP of Bangladesh Nationalist Party (BMP) as "a jungle law framed by the previous Awami League Government in 1974".[22]

2.7 Necessity of preventive detention

The necessity of preventive detention in times of war or emergency is well known. Many newly independent states devastating movements, abuse of personal liberty and freedom of speech appear to endanger the contexture of society.

> "There may be many parties and persons who may not be patient enough to follow constitution methods but are impatient in reaching their objectives and if for that purpose (they) resort to unconstitutional methods, and then there may be a large number of people who have to be detained by the executive. In such a situation, would it be possible for the executive to prepare the cases and do all that is necessary to satisfy the elaborate legal procedure prescribed"[23].

2.8 judicial remedies against preventive detention and recommendation

Though the Government generally used this preventive detention against the opposition but there are so many steps to get justice against preventive detention in Bangladesh. They are-

[22] The Daily Star, 25 July 1999
[23] Mahajan V.D (1972)Select Modern Governments", New Delhi, p-84

(A) Writ of Habeas Corpus:

If any person illegally detained then any person in favour of him can file a writ of Habeas Corpus under article 102(b) (1) of our constitution. The detune himself[24], or his father[25], or his wife[26], or his son, or his sister, or his relative, or even his friends can apply for this. Most of the cases the court found the weak grounds, vague & not any specific grounds. As a result the high court can relax the detune for following grounds-

• Detaining by Governments unlawful authority.
• Failure to state the grounds within time.
• Failure to give chance to be defend himself.
• Lack of nexus with the reason of detention.
• Not to produce the detune before advisory board within specific time.
• Mixing good grounds with bad grounds.
• Retrospective issuance of orders. And
• Failure to submit essential documents before court or not in proper time.

For such grounds when high court is satisfied that the detune has been detained arbitrarily then court can declare the detention illegal and order to release him immediately. In the time of emergency when writ of Habeas Corpus is withheld then a case filed under section 491 of Cr. Pc. to get directions or rule of the nature of a Habeas Corpus. Another interesting matter we want to highlight that "though it is stated that special power act there is no chance of filing a Habeas Corpus writ but people can because the Special Powers Act is a general law but article 44 & 102 gives the power to High Court Division to exercise Habeas Corpus writ which is a constitutional law as it is a constitutional law strong than general law"

(B) Suo Motu rule:

The Suo Motu rule is now not very new to us. It is exercised by High Court Division's judges if any illegal or inhuman matters happen and it comes to knowledge of the court through newspaper or report publishing[27].

[24] Charanjit Lal vs. Union of India, AIR (1951) SC 41
[25] Sundarajan vs. Union of India AIR (1970) Del 29 (FB)

[26] 40. Farzana Hoque vs. Bangladesh (writ petition 170 of 1990)
[27] Alamgir vs. The State AIR 1957 at p-285

(C) Compensation for wrongful arrest:

There is no provision for payment of compensation for illegal detention under the preventive detention law. So the detaining authority exercises arbitrary and malicious discretion. High court division declared 198 detentions illegal in a day and such a huge detentions cases being declared illegal in a day in our judicial history. But Bangladesh Supreme Court does not usually give directions of compensation but in same exception cases like in "Bilkis Akter Hossain vs. Government"[28]. The court directed one lakh to the each detent as compensation for illegal detention. Section 9(5) of the International Covenant on Civil and Political Rights 1966 days down "Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to get compensation." The Indian Supreme court ordered for compensation in Rudul Sah vs. State of Bihar case[29].

(D) Review of Advisory council:

We know it well that if the government wants to detain any person more than six months, he or she will be produced before the Advisory Board consisting three members- among two from High Court judges and another one from senior civil servant. A person cannot be detained under preventive detention law more than six months except consent of advisory Board. So considering the above discussion I forward the following recommendations:

1. As article 33(2) of Bangladesh constitution stated clearly that every person who is arrested and detained in custody shall be produced before magistrate court within 24 hours. But the detained person has been deprived of this opportunity and as such this provision should be repealed.
2. There must be constitutional provisions describing certain limited period when the powers of preventive detention exercised.
3. A judicial review should be held for those who are detained under different preventive detention law.
4. All reasonable opportunities should be provided to the detune.
5. The detune must not be kept with those who are regular convicts.
6. He or she will be informed as early as possible about the reasons behind his or her arrest.

[28] (MLR) Mainstream Law Reports vol.2 (1997) p-123
[29] AIR 1983 SC 1083

7. The relatives of the detune should be promptly notified of the detention and transfer of the detune.

8. The detune must be allowed immediate and regular access to lawyer family members and unbiased medical board.

9. The detune shall not be tortured or other ill-treatment in detention.

10. All allegations of oppressions should be quickly and immediately investigated.

11. Government should add a provision in our constitution ensuring the right to get compensation at least in peace time if any person is detained unlawfully.

12. The judgment and orders of any court should be obeyed entirely, immediately and strictly.

13. Government should restrict the use of preventive detention as much as government can. To ensure the proper functioning of democratic environment and to maintain human rights, the recommendation state above should be followed[30].

2.9 Demerits of preventive detention

It is true that most of the developing countries used the Preventive detention as a weapon to dominate, crash the opposition and to perpetuate rule.

In Bangladesh ,After achieving independence, there are no situations of war or internal aggression or internal disturbance which are threatening our security but this The Special Powers Act, 1974 are using still to suppress anti-government movement and sometimes democratic movement also.

- Firstly, in Bangladesh without trial six months detention can be conferred to the detainee. This is a bad process because now here in the world such along period is not found anywhere. In India, this time is three months21 and in Pakistan the initial period of detention is three months.
- Secondly, in democratic countries Preventive detention is a method resorted to in emergencies like war22. The western developed countries like USA, UK, and Singapore, it is specifically mentioned that only in time of emergency, Preventive detention is applied for and also for specific purposes, but there is no specification in our constitution and can be restored to in times of both peace and emergency.

[30] Patel, T; "*Personal liberty under the constitution of India*" Delhi (1993) at p-48

- Thirdly, we have not a fixed maximum period of detention not in our constitution or in the Special Powers Act 1974. This is also a negative aspect of Preventive detention. In Pakistan the period of Preventive detention is eight (8) months in a year23 and in India maximum two years.
- Fourthly, in Bangladesh a large number of political workers and leaders are detained without trial through the preventive detention under the Special Powers Act 1974 and known as a "Black Law". But this picture of detention without trial is not found in western countries where this preventive detention also exists[31].
- Fifthly, the Preventive detention under the Special Powers Act is keeping in line with the maintenance of Indian Security Act 1971 and the East Pakistan Public Safety Act 1958. But in Bangladesh the provision relating to Preventive detention made more draconian than those of twos. By 44th amendment the process of Preventive detention made something democratic in Indian constitution.
- Sixthly, police officer after arresting any person prays before Magistrate court for remand and in maximum cases police gets remand and starting bodily, mentally torture which is a violation of international human rights law.
- Seventhly, there is nothing entitled against whom a detention order has been made to appear by lawyer in any matter connected with the reference to the Advisory Board25, and its report excepting that part of the report in which opinion of the Advisory Board is specified shall be confidential.
- Eighthly, if any person is actually criminal that he or she would be arrested under general law and Magistrate can punish him or her but if it is happen then he or she must bring before Magistrate within 24 hours. But not to bring within 24 hours before Magistrate, a suspected is arrest under the Special Powers Act 1974. Because by this a person without bring before Magistrate can put in prison month after month.
- Ninthly, many suspected people who are not actually criminal, for wrong information they kept inside the jail. Among them who are rich come outside through writ of Habeas Corpus in High Court Division but those who are poor, they have no chance.

[31] Chowdhury Badrul Haider; "*The long Echocs*," Dhaka (1990) at p-3

CHAPTER 3

THE SPECIAL POWERS ACT, 1974 AND A COMPARISON OF THE SPECIAL POWERS ACT WITH INTERNATIONAL HUMAN RIGHTS NORMS

3. Preventive Detention

Preventive Detention Laws are legal instruments applied by the executive primarily to detain any person without any charge and trial. Apparently, these instruments run parallel to the penal laws that include al the grounds for which the detention law in general is enforced. Preventative detention has three specific features, first, it is detention and not imprisonment, second, it is a detention by the executive without trial or inquiry by a court; and third, its without trial or inquiry by a court; and third, its object its preventive and not punitive.

3.1 Preventive detention under the special powers Act 1974

Section-3. Power to make order detaining or removing certain persons : (1) The Government may, if satisfied with respect to may person that with a view to preventing him from doing any prejudicial act it is necessary so to do, make an order-

a) Directing that such person be detained

b) Directing him to remove himself from Bangladesh in such manner, before such time and by such route as may be specified in the order:

Provided that no order of removal shall be made in respect of any citizen of Bangladesh.

Power to make orders detaining or removing certain persons- (2) Any District Magistrate of Additional District Magistrate may, if satisfied with respect to any person that with a view to preventing him from doing any prejudicial act within the meaning of section 2(f0 (iii), (iv), (v), (vi), (vii) of (viii) it is necessary so to do, make an order directing that such person be detained.

(3) When any order is made under sub-section (2) the District Magistrate of the Additional District Magistrate making the order shall forthwith report the fact to the Government together with the grounds on which the order has been made and such other particulars as, in his opinion have a bearing on the matter, and no such order shall remain in force for more than thirty days after with making thereof unless in the meantime it has been approved by the Government.

(4). If any person fails to remove himself from Bangladesh in accordance with the direction of and order made under sub section (1) (b), then, without prejudice to the prejudice to the provision of sub section (5), he may be so removed by any police officer or by any person authorized by the Government in this behalf.

(5) If any person contravenes any order made under sub suction (1) (b), he shall be punishable with imprisonment for a term which may extend to three years, or with fine, of with both.

Section-4. Execution of detention orders: A detention order may be executed at any place in Bangladesh in the manner provided for the execution o warrants of arrest under the Code.

Section-6. Detention orders not to be invalid or inoperative on certain grounds : No detention order shall be invalid or inoperative merely by reason that the person to be detained there under is outside the limits of the territorial jurisdiction of the Government or the District Magistrate of Additional District Magistrate making the order, or that the place of detention of such person is outside the said limits.

Section-7. Powers in relation of absconding persons: if the Government of District Magistrate or an Additional District Magistrate mentioned in section 3(2), as the case may be, has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot executed, it or he may-
(a) make a report in writing of fact to a Magistrate of a first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the previsions of section 87, 88 and 89 of the Code shall apply in respect of the said person and his property as if the order directing that he be detained were warrant issued by the magistrate;
(b) by order notified in the official Gazette direct the said person to appear before such officer at such place, and within such period as may be specified in the order; and if the said parson fails to comply with such direction he shall, unless he proved that is was not possible for him to comply there with and that he had, within the period specified in the

order, informed the officer of the reasons which rendered compliance there with imprisonment of a term which may extend to one year, or with fine, or with both.

Section-8. Communication of grounds of order : (1) In every case where an order has been made under section 3, the authority making the order shall, as soon as may be, but subject to the provisions of sub-section (2), communicate to the person affected thereby the grounds of which the order has been made to enable him to make representation in writing against the order and it shall be the duty of such authority to inform such person of his right of making such representation and to afford him the earliest opportunity of doing so:

Provided that nothing in this section shall require the authority to disclose the facts which is considers being against the public interest to disclose.

(2) In the case of a detention order, the authority making the order shall inform the person detained under that order of the grounds of his detention at the time he is detained or as soon thereafter as is practicable, but not alter than fifteen days from the date detention.

Section-9. Constitution of advisory board: (1) The Government shall, whenever necessary, constitute an Advisory Board for the purposed of this Act.

(2). The Advisory Board shall consist of three persons, of whom two shall be person who are, or have been, or are qualified to be appointed as, Judges of the 1 [High Court} and the other shall be person who is a senior officer in the service of the Republic, and such persons shall be appointed by the Government.

(3). The Government shall appoint one of the members of the Advisory Board who is, of has been, or is qualified to be appointed as, a Judge of the High court to be its Chairman.

Section-10. Reference to advisory board: In every case where a detention order has been made under this Act., the Government shall within one hundred and twenty days from the date of detention under, place before the Advisory Board constituted under section 9 the

grounds on which the order has been made and the representation, if ay, made by the person affected by the order.

Section-11. Procedure of advisory board: (1) The Advisory Board shall, after considering the materials placed before it and calling for such further information as it may deem necessary form the Government of from the person concerned the after affording the person concerned an opportunity of being heard in person, submit its report to the Government within one hundred and seventy days from the date of detention.

(2). The report of the Advisory Board shall specify in a separate part there of the opinion of the Advisory Board as to whether of not there is sufficient cause for the detention of the detention of the person concerned.

(3). When there is a difference of opinion among the members of the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.

(4) Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the repot in which in opinion of the Advisory Board is specified, shall be confidential.

Section-12. Action upon the report of Advisory board : (1) In any case where the Advisory Board has reported that there is, in its opinion, sufficient cause for the detention of a person, the Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit :

Provided that the Advisory Board shall, after affording the person concerned and opportunity of being heard in person, review such detention order, unless revoked earlier, once in e3very six months born the date of such detention order and the Government shall inform the person concerned, the Government shall revoke the detention order and cause the person to be released forthwith.

Section-13. Revocation of detention order: A detention order may, at any time, be revoked or modified by the Government.

1). The Government passed two inconsistent orders on the same date, one directing the revocation of the detention and directing his immediate release, and the other for his fresh detention. This exposes the fact that on the one hand government felt satisfied that there was no cause for his detention and in the next breath government expressed its satisfaction that he should be detained. This certainly means that the government failed to apply its judicious mind in the matter of deciding to detain the petitioner. Such detention is illegal[32].

2). The Government revoked the order of detention of the detenu and there after instaed of releasing the detent passed fresh order of detention under the Specialy Powers Act. Theis fresh order of detention without releasing the detune from jail is illegal[33].

3). As the Government have taken steps in time for revoking the detention order upon publication of newspaper report and that the criminal cases against the detune are pending it is expected that the provision of law shall not be discriminately misused or abused i9s curtailing the fundamental right of the citizen in the enjoyment of life and liberty and that no compensatory cost was awarded as the criminal cases are sub judice against the detent. [Bangladesh Legal Aid and Services Trust (BLAST) vs Bangladesh & other 4 BLC 600]

Section -14. Temporary release of persons detained: (1) The Government may, at any time, direct that any person detained in pursuance of detention order may be released for any specified period either without conditions or upon such conditions specified in the direction as that person accepts, and may, at any time cancel his release.

(2). In directing the release of any person under subsection (1) the Government may require him to enter into a bond, with or without sureties for the due observance of conditions specified in the direction.

[32] Sayedur Rahman Khalifa vs Secretary, Ministry of Home affairs 1986 BLD 272 (DB)

[33] Monowara Begum va Sevretary, ministry of Home Affairs 1989 BLD 467 (BD)

(3). Any person released under sub-section (1) shall surrender himself at the time and place, and to the authority, specified in the order directing his release of canceling is release, as the case may be.

(4) Of any person fails without sufficient cause to surrender himself in the manner specified in sub-section (3), he shall be punishable with imprisonment for a term which may extend to two years, o0r with fine, or with both.

(5) If any person released under sub-section (1) fails to fulfill any of the conditions imposed upon him under the said sub-section or in the bond entered into by him, the bond shall be declared to be forfeited any person bound thereby shall be liable to pay the penalty there of.

Seciton-15. Sabotage : (1) No person shall do any act with intent to impair the efficiency of impede the working of, of to cause damage to,-

a) Any building, vehicle, machinery, apparatus of other property used, of intended to be used, for the purposes of the Government or of any local authority of nationalized commercial or industrial undertaking;

b) Any railway, aerial ropeway, road, canal, bridge, culvert, causeway, port, dockyard, light house, aerodrome, telegraph of telephone line or post, or television or wireless installation;

c) any rolling-stock of any railway or any vessel or air craft;

d) any building or other property used in connection with the production, distribution or supply of any essential commodity, and sewage works, mine or factory;

e) any place or area prohibited or protected under this Act or any other law for the time being in force' or

f) any jute, jute product, jute godown, jute mill or jute bailing press.

2). The provisions of sub-section (1) shall apply in relation to any omission on the part of any person to do anything which he is under a duty, either to Government or to any public authority of to any person, to do, as they apply to the doing of any act by a person.

3). If any person contravenes any of provisions of this section, he shall be rigorous imprisonment for a term which may extend to fourteen years, and shall also be liable to fine.

The concept of preventive detention in operational terms seems to have been in existence in some forms since the early period of British rule in India. The departure of the British from India and Pakistan to adopt preventive detention statutes. Bangladesh retained most of the preventive detention is resorted to against enemy aliens in emergencies such as war when the evidence in possession of the detaining authority is not sufficient to secure the immediate convention of the detent by the normal legal process[34].

Generally before a preventive detention case is brought before the High court, a three member Advisory Board headed by a sitting High court Judge is constituted by the government to examine whether the detention is Justified or not. Surprisingly, the proceedings of the Board are confidential except for that part of the report which expresses the opinion of the Board. But what is more appalling is the denial of the detent's fundamental right to be represented by a professional lawyer before the Board. This is a blatant violation of human rights and goes against Article 33 of the Bangladesh constitution, which says "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice". Thus in a majority of cases the Advisory Board upholds the detention due to lack of proper legal representation on behalf of the detent. Preventive detention is a special form of imprisonment. Most persons held in preventive detention are criminal defendants, but state and federal laws also authorize the preventive detention of persons who have not been accused of crimes, Such as certain mentally ill persons.

The original constitution of Bangladesh did not contain any provision that could put the state under emergency with holding the enforcement of people. But under the constitution (Second Amendment) Act 1973, articled 26 and 33 of the constitution were amended making provisions for preventive detention. During the two martial law periods of 1975-

[34] (1917) AC 260

1979, 1982-1986, 1987 and 1990 fundamental right of the people came under serious threat and thousands of people were made victims of detention. The fundamental right during the period of emergencies as guaranteed in part III of the constitution were suspended. Emergency, martial law and constitutional rule co-existed during the period of 1975-1979[35]. The number of persons preventively detained by the executive authority since independence is not available. Yet, attempts have been made to prepare a working estimate of the detainees from the available number of cases, which came up before the High court Division of the Supreme Court by way of writ of habeas corpus. The total number of writ petitions that came up before the High Court Division till 1998 Since independence was 20, 572 as moved by way of writ of habeas corpus under the provisions of article 102 of the constitution, and under section 491 of the code of criminal procedure, 1898.

3.2 Comparison of the special powers Act with the international human rights norms

(i) Section 3 of the Special Powers Act provides that if a District Magistrate or an Additional District Magistrate becomes satisfied as to any person's intent to do a prejudicial act he may order for arrest of the person. Mere satisfaction of the Magistrate has been made enough for the order of detention. But article 9 of the UDHR has unequivocally declared that no one shall be subjected to arbitrary arrest, detention or exile. Simultaneously article 9 of the ICCPR (ratified on 6 September 2000) provides that everyone has the right to liberty and security of his/her person. No one shall be subjected to arbitrary arrest or detention.

(ii) Section 8 of the Special Powers Act provides that the arresting and detaining authority may inform the detent the cause of his arrest within 15 days from the arrest. And even for public safety he may not be so informed.

We may follow article 33(1) of the Constitution, which provides that the rights to be given to a person arrested under a general law are not to be allowed for a person arrested under a law providing for preventive detention. These rights not allowed for a person arrested

[35] Act xxxvi of 1950

under a law providing for preventive detention like the Special Powers Act, are: (a) right to be informed of the cause of arrest as soon as possible after the arrest and (b) right not be detained if no cause is informed as soon as possible after the arrest. It might be argued here that as the Special Powers Act is a law providing for preventive detention so the detenu has no right to be informed of the cause of his arrest as soon as possible, and therefore not informing him the cause as such is no violation of the Constitution. We also agree with this opinion that it is no such violation of the Constitution but it is undoubtedly admissible that it is a violation of article 9 of the UDHR and article 9 of the ICCPR.

(iii) Section 10 of the S.P. Act is also an infringement of article 9 of the UDHR. For this section 10 provides for that the government can detain a person without trial for a time of 120 days. Not only this, the Act contains the provision of detaining a person firstly from 120 days to 170 days and lastly for an uncertain length of time i. e. lifelong. Such detention is called preventive detention. Lord Atkinson has clearly defined it as the detention of a person without trial in a court of law, by an order of the executive not with a view to bringing a criminal charge against him but with the intention of preventing him from engaging in activities prejudicial to the safety and security of the state (in Rex vs. Halliday, the Law Reports, A.C. 1917, 273). Preventive detention may be called an extra ordinary method; because the detent is arrested and detained only on the plea and speculation of his doing any act subversive of or against the safety of the security of the state and without any proof against him.

(iv) Section 11 of the Act, in this modern day of civilization, provides that the detenu shall have no right to defend himself through a lawyer and not only that, our sacred Constitution has supported this view. But this provision of not allowing to defend oneself and to produce one's statement is ultra vires to the principle of natural justice, for one of the preconditions of natural justice is Audi Alterum Partem -- none shall be condemned unheard. This provision of the Act is also against article 11(1) of the UDHR which provides that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(v) Section 16 of the Act has created much obstacle to the freedom of expression through the banishment of many newspapers. It violates the right of the people to freedom of thought, expression and conscience. Section 16 also violates articles 18 and 19 of the UDHR and simultaneously article 39 of the Constitution. Article 18 of the UDHR says, everyone has the right to freedom of thought, conscience …, and article 19 says, everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Again article 39(1) of our Constitution provides that freedom of thought and conscience is guaranteed. But the honourable Court in Mujaffar Khan v. the State (PLD 1959) observed: Press is the mouth-piece of public opinion… It has to work as a link between the parliament which frames the legislation and the public which express their hope and aspirations through it.

(vi) Section 20 of the Act has made hindrance to form political party based on religion. whereas article 20(1) of the UDHR has provided that everyone has the right to freedom of peaceful assembly and association. It is to be mentioned that political parties are generally formed on ground of any particular spirit or for the achievement of any particular aim and target. Article 20(1) of the UDHR did not say that no party should be formed on ground of any particular ideal, spirit or aim. The only precondition imposed by article 20(1) on the formation of an assembly or association is that it should be peaceful. Therefore section 20 has also infringed article 20(1) of the UDHR.

(vii) Whenever the question arises as to whether a person has to be detained for more than 6 months, the positive opinion of the Advisory becomes necessary. That means without such opinion the government may detain him for an uncertain time which is less than 6 months, as per its sweet-will. This provision also is against article 9 of the UDHR. Of course, many people like Justice Kayani has opined on the necessity of the opinion of the Advisory Board when one has to be detained for more than 3 months [in Ghulam Muhammad Khan Loondkor v. the State, PLD (WP) 1957, Lah., 497].

But people think that a person should not be detained without trial even for 3 days. Of course 24 hours might be so allowed for the purpose of arresting and producing a person to the nearest Magistrate as provided by article 33 of the Constitution.

CHAPTER 4

FUNDAMENTAL RIGHTS OR SAFEGUARD TO OUR SOVEREIGNTY

4.1 Preventive detention and violation of fundamental rights

Right against arbitrary arrest and detention is one of the important element of fundamental rights emphasized by numerous international fundamental rights instrument. Preventive detention, though an evil, is sometimes a necessity for state security. Although this detention has to be only under special circumstances and with accordance with the due procedure of law. Unlawful detention affects several other rights guaranteed by the Constitution consequently it violates fundamental rights of a person.[36]

Amongst the national institutions, the judiciary always comes in the forefront of the national systems for the protection of fundamental rights. One of the main functions of the judiciary is to protect fundamental rights guaranteed in constitutions and laws. In protecting rights, the function of the judiciary is to oversee the way in which the diverse powers of government are exercised within the framework of laws and a set of values, and to protect individuals from arbitrary governmental action.

Preventive detention is a serious encroachment upon the personal liberty of a person, for the simple reason that, unlike ordinary arrest or imprisonment, preventive detention is effected without trial. But in guise of preventive detention law, most of the times the executive authority exercise discretionary power regarding arrest and detention and violates fundamental rights.[37]

[36] Pankaj Kumar vs. State of West Bengal, AIR 1970 SC 97
[37] Article 33(4), Constitution of Bangladesh and Section 9 of the Special Powers Act, 1974.

4.1.1 Violation of Rights to Life by Preventive Detention

'Life' within the meaning of means something more than mere animal existence. It includes the right to live consistently with human dignity and decency, right to the bare necessities of life such as adequate nutrition, clothing and shelter and the facilities for reading, writing and expressing oneself its diverse forms, freely moving about and mixing and commingling with fellow human beings and all that which gives meaning and content to a man's life including tradition, culture and heritage.[38]

According to a leading news daily of Bangladesh, country's 68 jails, which are designed to detain 34,147 inmates but currently they are holding 71,606. Preventive detention is not for punitive purpose, but the condition in which a person is detained is more than what punishment can be meant. So by detaining a person under preventive detention in jails, which are degrading for any human being to live in, is a gross violation to right to life of the detent person.

4.1.2 Violation of Right to Liberty and Freedom of Movement

Article 32 of the Bangladesh Constitution ensures personal liberty to every person and Art. 36 ensures freedom of movement, which means every citizen shall have the right to move freely.

But by detaining any person under colourful exercise of the laws regarding preventive detention, the detaining authority violates these fundamental human rights. Again the laws regarding preventive detention itself has many lacunas which the executive authority often takes advantage of. In Bangladesh without trial six months' detention can conferred to the

[38] Ibid, Section 12,

detainee. This is a bad process because nowhere in the world such a long period is not found. In India and Pakistan, the initial period of detention is three months.[39]

Secondly, no maximum period of detention has been fixed by the Constitution or the Special Powers Act. So a person can be detained for indefinite period where the advisory board thinks it fit. Whereas the maximum period in India is 2 years and 8 months in a year in Pakistan.

Also in Bangladesh there is no specific time when preventive detention law can be applied. It can be applied in both peace time and emergency time. However, in most democratic countries Preventive detention is a method resorted to in emergencies like war. The western developed countries like USA, UK, and Singapore, it is specifically mentioned that only in time of emergency, Preventive detention is applied for and also for specific purposes, but there is no specification in our constitution and can be restored to in times of both peace and emergency.

Moreover, in Bangladesh the Government frequently uses the police for political purposes and provided immunity to members of security forces. There are wide spread corruption allegations and a severe lack of resources, training, and discipline amongst the detaining authorities present. Bangladesh has a large number of political workers and leaders detained without trail through preventive detention under the Special Powers Act 1974, which is a great violation of right to liberty and freedom of movements. On 7 September 2000 a three-member Sub-committee of the Parliamentary Standing Committee submitted a 31-page report on SPA to the Parliament, in which it mentioned that 69,010 people were detained under SPA of 1974 in the last 24 years and 68,195 persons were released by order of the High Court Division.

Special Powers Act has become a draconian law because of its unconstitutional provisions and also its unlawful use by detaining authority. Special Powers Act is a draconian law because under this Act,

[39] Chowdhury, Obaidul Huq, Special Powers Act, Dhaka, 1996, at p. 49.

- A detainee has not given any right to know the grounds for which he is detained through the judicial body.
- Secondly, the Govt. can arrest and detain any person at any time.
- Thirdly, the Govt. can detain a person for an indefinite period of time if wishes.
- It is against the commitment and spirit of the Constitution and human rights.

4.1.3 Violation of Right to Freedom from Torture and Cruel, Inhumane or Degrading Treatment

Under the Special Powers Act Govt. can use the police officers to arrest any person. And it is a common practice amongst the police to inflict bodily and mental torture or cruel treatment of the persons detained. In spite of constitutional guarantees and protection under International Bill of Rights, such as UDHR and ICCPR the police often in the name of state security detain any person they wish and use torture and cruel treatments in the name of getting information from them.[40]

An example of the scale of the problem is the four-week crackdown on May 28, 2008 resulting in the arbitrary arrest and detention of more than 50,000 Bangladeshis. Media reports indicated that most persons arrested were subjected to same from of ill-treatment, including beating and that torture was also used on a significant number of detainees, during which the police extracted money or confessions.[41]

[40] Ibid.
[41] The Daily Star, 8 June, 2006.

4.1.4 Violation of Right to Fair Trail

When a police officer arrests a person under sec. 54 of the CrPC, then the arrested person must be produced before the magistrate within 24 hours of such arrest. But if the Govt. wants to detain any person under sec. 3 of the SPA and makes an order for such detention, the police can put him into prison for 6 months without producing him to any Judicial or Executive authority.[42]

Moreover, many suspected people are detained under wrong information. And most of them don't possess the means to go to the judicial body to seek remedy. Only the rich can go to the High Court Division and get remedy by instituting the writ of Habeas Corpus.

Art. 33(5) requires that the grounds of detention must, as soon as may be, be communicated to the detent and the detaining authority must afford him the earliest opportunity of making a representation against the order of detention. It is very important because it not only enables the detent to make the representation, but also enables him to file a proper application for a writ of Habeas corpus. But there is a proviso to Art. 33(5) and also Section 8(1) of the SPA, 1974 permits the detaining authority to refuse to disclose the facts which it considers against the public interest.

However, the ambit of public interest has not been defined, so this proviso is often used as an exploitation tool and in denying right to fair trial. Again Section 11(4) of the SPA states that, the detainee against whom a detention order has been made cannot appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential. And as the report of the Advisory Board is binding on the executive authority and the Govt., it is always influenced by the authority.

[42] Bangladesh Legal Aid and Services Trust and another vs. Bangladesh and others [Children Act, 1974 Case] Writ Petition No. 1341 of 2000 22 BLD (2002) 206

4.1.5 Freedom of speech and expression

Human rights defenders and professionals, including from media, were regularly being monitored, threatened and intimidated by the personal of the country's armed forces and various intelligence agencies. The democratically elected government do not always have the scope to utilize the emergency provisions for doing the above misdeeds.

However, in the name of SPA and anti-terrorism Act, it has arrests various persons, inflicts torture on some of them and threatens everyone who wish to speak against the Govt. of order of preventive detention against them.

4.1.6 How Safeguards Sovereignty of the State

Effects of recognition[43]

India was the first country to recognize Bangladesh in December 1971, paving the way for further Indian assistance. The act of recognition was vital since it transformed the A warni League from a separatist movement to an aspiring international actor. Other states followed suit and within a year Bangladesh was accepted as a full-fledged international entity.[44] Pakistani recognition of Bangladesh in 1976 and UN membership finally confirmed Bangladesh's status as a sovereign state. The recognition of Bangladesh raised several interesting questions in the international legal discourse. Prime amongst these was whether the recognition of a state wipes out the issue of lawfulness of acts relating to its creation, or, in other words: does the fact of Bangladesh having become an undisputed actor at the international plane automatically render questions about the legality of its creation irrelevant? Or, does it simply mean that any contested claim attains legality as long as it is victorious. This question would perhaps ruefully be answered in the affirmative by Biafrans, but that would reduce the international system once more to one where the outcome of international conflict is primarily determined by the effectiveness of

[43] See I.DUGARD, Recognition and the United Nations (1987); H.LAUTERPACHT, Recognition in international law (1947); S.TALMON, Recognition of governments in international law (1997).
[44] By the end of February 1972, 31 countries had recognized the state of Bangladesh as a sovereign state.

force.[45] Another question that needs to be addressed relates to the point at which a struggle for secession becomes a cause that may be supported by another State. More specifically, what level of assistance is a UN member state entitled to provide against the sovereignty of another member state? Does recognition de facto confer legality upon a fledgling State?[46] These issues are extremely problematic and there are no clear answers forthcoming. Next, there are two other important issues that need to be discussed with regard to the recognition of Bangladesh. First, the relevance of the Indian recognition to the unfolding of the crisis, and second, the impact of the timing of the recognition. As to the first issue the answer will have to be that the Indian recognition was a significant step in the emergence of the fledgling state. Gaining a strong supporter like India who was willing, after long covert support,[47] to overtly endorse the cause of the new state in the international arena, undoubtedly facilitated the latter's further emancipation. Within a month of the Indian recognition Bhutan followed suit[48] and by February 1972 thirty-one countries had recognized the state of Bangladesh. As for the second issue, early Indian recognition would most probably have been denounced by the international community. As has happened with the so-called Turkish Republic of Northern Cyprus,[49] the international community usually avoids hasty recognition since it compromises the domestic jurisdiction of the state from which the entity in question is seceding.[50] Early recognition of Bangladesh would definitely have been judged as undue interference in the internal affairs of Pakistan within the scope of Article 2(7). By early March, prior to the military action, the A warni League was the de facto government in the territory,[51] demonstrating its effective control by a high-visibility, successful, civil disobedience movement. Yet recognition at that stage may still have been considered premature. Had the international community recognized the fact that at the time the reigns of government were already in the hands of the Awami League, exercising effective de facto control over the territory, it would have saved at least 3 million lives and prevented what was the worst

[45] See CRAWFORD, loc.cit.n.72 at 93.
[46] Ibid. at 99.
[47] See FELDMAN, op.cit.n.78 at 165.
[48] Bhutan at the time was an associate state of India. Therefore, the Bhutanese support for Bangladesh was possibly influenced by Indian policy rather than inspired by any firm belief in the Bangla cause.
[49] See K.Chrysostomides, The Republic of Cyprus: a study in international law (2000); Z.M.NECATIGIL, Our republic in perspective (1985).
[50] See, however, the effect of early recognition of Croatia in 1991: S.STOJANOVIS, "The destruction of Yugoslavia", 19 Fordham Journal of International Law (1995) 337.
[51] See MASCARENHAS, op.cit.n.32.

refugee crisis of the time. However, the states were helpless owing to the veil of Article 2(7) that was still firmly in place. It appears legitimate to ask why 3 million people needed to be killed and a further 10 million displaced before the situation of mid-March re-occurred, this time to the satisfaction of an 'international community' with its limited will to see its resolution. The answer seems to be that in the interest of international order, peace and security it was the only way forward. The Biafra experience of only a few months earlier had reiterated the Hegelian concept of the nature of sovereignty: a nation can only mature into political manhood if it can successfully mobilize its people in its defence.[52] Similarly, recent history suggests that, in general and notwithstanding exceptional cases like the international action in Kosovo, a separatist movement must defend itself successfully against adverse force, if it is to stake a claim to recognition as a state.

[52] See ELSHTAIN, loc.cit.n.53 at 403.

CHAPTER 5

A REVIEW ON PREVENTIVE DETENTION

5.1 Preventive detention law in Bangladesh : A review

The first thing after achieving independence the people aspired to get was a constitution where the fundamental rights of the people would be ensured. The Constitution of Bangladesh was adopted on the 4th December and was given effect to from the 16th December 1972, the first anniversary of the 'victory day'. The constitution makers felt the necessity of giving recognition to the basic human rights in consequence of which they incorporated the provisions of Universal Declaration of Human Rights, 1948[53].

A study of the Constitutions of India and Pakistan of the then period reveals that the constitution makers allowed the Parliaments of their respective countries to pass the preventive detention laws. The original Constitution of Bangladesh did not contemplate preventive detention law without the authority of the court. But it is a fact that by the Constitution (Second Amendment) Act, 1973, which amended Article 33, the parliament had been empowered to pass preventive detention laws.

After the liberation of Bangladesh, the Bangladesh Scheduled Offences (Special Tribunal) Order, 1972, popularly known as P.O. 50/1972 was promulgated with a view to control the market of essential commodities and some marked criminal offences. The provisions of preventive detention were severe and as such popular discontent began to increase every day. Awami League, the then ruling party repealed the P.O. 50/1972 along with the Security of Pakistan Act, 1952 and Bangladesh Public Safety Ordinance, 1958 in the teeth of serious public criticism. Soon after the people got relief from the pangs of the repressive laws, the Parliament on February 9, 1974 enacted the black law, "Special Powers Act, 1974" containing the provisions of preventive detention. The Act says that any person can be arrested and detained by the executive authority if there is apprehension in the mind of the authorities that he may commit "prejudicial act" which means-

(i) to prejudice the sovereignty or defence of Bangladesh;
(ii) to prejudice the maintenance of friendly relations of Bangladesh with foreign States;
(iii) to prejudice the security of Bangladesh or to endanger public safety or the

[53] Section 2(f) of the Special Powers Act, 1974

maintenance of public order;

(iv) to create or excite feelings of enmity or hatred between different communities, classes or sections of people;

(v) to interfere with or encourage or incite interference with the administration of law or the maintenance of law and order;

(vi) to prejudice the maintenance of supplies and services essential to the community; (vii) to cause fear or alarm to the public or to any section of the people; (viii) to prejudice the economic or financial interests of the State.

It is pertinent to mention that the Awami League launched movements to repeal all repressive laws. As a consequence, we find that the authority presented a bill in the Assembly on 20th September 1958 for repeal of the Security of Pakistan Act, 1952. But the same party, on being in power after the liberation of Bangladesh presented the Special Powers Bill, 1974 in order to materialize their heinous political interest. Two members of the Parliament Mr Ataur Rahman Khan and Mr Abdus Sattar, belonging to the B.J.L. and J.S.D. vehemently objected but the ruling party overlooked them. This law was primarily enforced on the tribal people of Chittagong Hill Tracts, political rivals and especially, the suspected members of Jatio Shmajtantirik Dol and the Shorbohara Party.

In continuation, the governments have been using this law for the last thirty years apparently to threat, suppress and harass the opposition leaders and workers The Special Powers Act, 1974 explicitly authorizes an individual to be detained -- without charge or trial -- for up to six months and up to indefinite period if so sanctioned by the Advisory Board.

What happens in reality is that after arrest, the police officer prays to the court for remand and thereafter they start to an extent physical and mental torture which is a flagrant violation of international human rights law. It may be reiterated that physical and mental torture has become a common feature in most of the countries of the world.

All the political parties when out of power make serious criticism of the law and promise in the election manifesto that they would repeal this black law if put into power. For example, the three alliances during the movement for fall of the autocratic Ershad regime

had been very vocal that they would introduce the practice of democracy after repealing the Special Powers Act, 1974 which violates human rights. But it is regretting that the Bangladesh Nationalist Party (B.N.P.) which came into power started emphasizing that it is a law of utmost necessity and government cannot work without it. Likewise, Sheikh Hasina, Awami League Chairperson, declared before she came into power through the Parliament election held on 12th June 1996 that she would repeal the law if came to power. But after assuming power she pulled her tone in opposite direction by announcing that its efficacy to past governments justified its existence. Again BNP in its election manifesto in 2001 said that it would scrap this tyrannical law if came to power but it did not. The present government also has not repealed the Special Powers Act, 1974.

It is mentionable that in democratic countries preventive detention is usually a method resorted to in emergencies like war. For instance, in America, the law relating to preventive detention is the Internal Security Act, 1950, which provides that the powers of preventive detention can be exercised only in times of an emergency like war. Similarly, provisions for preventive detention cannot be found in England, except only during an emergency like war. But in Bangladesh, laws regarding preventive detention can be resorted to in times of both peace and emergency which is really disappointing.

5.2 Preventive detention laws: The ‘black laws’ of Bangladesh

On 6 September 1999, the Cabinet of the Government of Bangladesh endorsed in principle the draft Public Security (Special Provision) Bill 1999. While the details of the proposal are not public, the Government has indicated that the Bill provides for Special Tribunals and stern punishment for specified crimes including extortion, hijacking, property damage and arson--acts that are already criminal under the Bangladesh Penal Code. The Government has made no secret of the fact that the Bill is aimed at the arrest and detention of so-called "terrorists" and enemies of the state of Bangladesh. Inevitably, these so-called "terrorists" will include members of the political opposition to the Awami League Government.

The threat posed by Public Security (Special Provision) Bill should be considered in light of Bangladesh's experience with national security legislation. The Suppression of Terrorism Act 1992--under which over 6,900 people were detained and subject to summary trials--lapsed in 1994. The Public Security (Special Provision) Bill simply appears to be its latest reincarnation. Indeed, Bangladesh's short history has been littered with preventive detention and anti-terrorism laws--the best established and draconian of which is the Special Powers Act 1974[54].

Preventive detention laws have existed on the sub-continent since British colonial rule in the nineteenth century. After gaining independence, both India and Pakistan allowed for the continuation of preventive detention laws in their respective constitutions. As a result, during the struggle for independence from Pakistan, Bengali freedom fighters were arbitrarily arrested and detained on a routine basis. Upon Independence, the political leadership of Bangladesh declared its commitment to ending this practice, and the Constitution of Bangladesh, promulgated on 6 December 1972, did not provide for preventive detention. However, the pledge was short-lived.

In September 1973, the Parliament passed the Second Amendment Bill which amended Article 33 of the Constitution of Bangladesh and authorised Parliament to pass preventive detention laws. While the inserted provision did provide for some safeguards--such as the production of the detainee before an Advisory Board within six months of his or her detention--the effect of the amendment was to open the way for wide-scale arbitrary detentions.

Five months after the adoption of the Second Amendment Act, the Special Powers Act 1974 (the Act) was passed. The Act was purportedly designed to crush "black marketeers." However, it was immediately used to neutralise political opponents. The primary targets of the Act were suspected members and sympathisers of the radical left and Jumma activists in the Chittagong Hill Tracts (CHTs). Over the following 25 years, successive governments have continued to use the Special Powers Act to control freedom of expression and to suppress political opposition. The limited safeguards provided in the Act have also allowed District Administrators to use it as a tool of intimidation against

[54] Section 11 of The Special Powers Act 1974

suspected political opponents and their families and against people engaged in personal feuds with the authorities.

While political opposition parties have repeatedly promised to repeal the law if elected, the law has been maintained when various groups have come to power. For example, during the rule of the Bangladesh Nationalist Party (BNP) from 1991-1996, thousands of members of the Awami League were arrested under the Special Powers Act. During her election campaign, Prime Minister Sheikh Hasina undertook to repeal the Act if elected. In March 1997, Prime Minister Hasina announced there was no plan to repeal the Act; its utility to past governments justified its existence. Not surprisingly, the Awami League Government has extensively used the Act to detain BNP activists.

The Act provides for the detention of individuals who might commit "prejudicial acts" against the State. Under Section 2(f) of the Act, "prejudicial acts" include undermining the sovereignty or security of Bangladesh, creating or exciting feelings of enmity and hatred between different communities and interfering with the maintenance of law and order. The Act provides no guidance on the burden of proof necessary for the government to conclude that an individual is likely to commit a prejudicial act. As a result, detentions under the Special Powers Act generally rely on allegations with very little evidence.

There are little, if any, institutional checks against abusive use of the Act by government officials. Detention under the Act is generally performed at the behest of the District Magistrate or Additional District Magistrate in the area. In most districts, the District Magistrate is also the District Administrator, as Article 115 of the Constitution of Bangladesh provides that subordinate courts are to be under the control of the Executive. The failure of the separation of powers has meant that detentions are often politically motivated within the districts. The Ministry of Home Affairs is supposed to provide a report within 30 days stating the grounds for detention of an individual. The Act allows for initial detention of a period of one month, after which time an Advisory Board can indefinitely extend the detention for six-month periods at a time. Additionally, detainees are denied the right to legal representation before the Advisory Board.

The only hope for most detainees are the few lawyers who are willing and prepared to file habeas corpus petitions before the High Court Division of the Supreme Court of Bangladesh on a pro bono basis. The cost of legal fees for filing such petitions extends to over Tk. 10,000 (or $US 200), which is well outside the financial reach of most people detained under the Act. As a result, only around half of those detained are ever able to take their cases before the High Court Division of the Supreme Court of Bangladesh. Review is limited. The High Court Division holds the only hope for the speedy release of detainees. From 1974 to March 1995, 10,372 petitions of habeas corpus were moved before the High Court in Dhaka. More recent figures indicate that in 10,651 (or 99.3%) cases, the court found that there was a prima facie reason to believe that the detention was illegal. Ultimately, detention was found to be valid in only 8.57% of cases. While the Supreme Court of Bangladesh in *Bilkis Akhte*.

The frequency with which the Special Powers Act has been used, has increased drastically since its introduction. In 1974, a total of 513 individuals were detained under the Act. In the first six months of 1999, 6,650 individuals were detained under the Act. Various types of people are detained under the Act--politicians, students, family members of opposition leaders and personal enemies of police personnel and government administrators.

One of the latest targets under the Act are suspected opponents of the 2 December 1997 Peace Accord in the CHTs. On 12 April 1999, Dipayan Khisa and Usain Marma, students in the CHT, were arrested without a warrant by the Bandarban Thana Police. They were produced before the local Magistrate and remanded for three days, after which time they were sent to Bandarban District Jail. On 16 April 1999, the two students were served with orders and grounds of detention under the Special Powers Act. They were detained on the grounds that they were members of an armed terrorist group and had distributed leaflets that incited hatred against Bangladesh. Both students were fortunately able to secure the services of a lawyer who filed writ petitions No. 1375 and No. 1376 in the High Court Division of the Supreme Court. On 14 June 1999, the court found that their detention was illegal and ordered their release. Both of them had been illegally detained for two months and were nevertheless denied compensate

The proposed Public Security (Special Provision) Bill would provide the Government of Bangladesh with yet another avenue for abuse of due process and the suppression of political opposition. In a region characterised by widespread human rights abuses excused in the name of "national security," the Special Powers Act is already one of the most resilient limits on democracy. Until the Government of Bangladesh genuinely commits to securing fair democratic processes for responding to dissent, the Special Powers Act will remain an accepted tool of government and an albatross around the neck of a country that aspires to be a mature democracy.

The proposed Public Security (Special Provision) Bill threatens to take Bangladesh further down the road away from democracy. The continuation, if not amplification, of abuses under the Special Powers Act indicate the experience that will likely be suffered under the Public Security (Special Provision) Bill if it passes into law.

5.3 case study

Despite the legal and constitutional provisions against arbitrary arrest and detention, the practice of arbitrary arrest, detention and torture is rampant in Bangladesh. Fortunately, the higher judiciary in Bangladesh has taken a proactive stand in prevention of arbitrary arrest and

detention and protection of people from torture. The most important judicial decision in this regard in recent years is BLAST vs. Bangladesh.[55]

In ASK (Ain 0 Salish Kendra) vs. Bangladesh and others**:**

the unlawful detention of the prisoners languishing in Dhaka Central Jail, despite having served out their terms of
conviction, was challenged. According to law, after pronouncing conviction, the court will send the conviction warrant to the jail authority. But due to negligence of court staff and

[55] 55 DLR (HCD) (2003) 363 / A document of National Human Rights Commission, Bangladesh

jail authorities, the said conviction warrants did not reach the jail and many prisoners could not be released from jail, even after serving out their terms of conviction. [56]TheCourt issued a rule nisi upon the respondents on April 16, 2005 to show cause as to why the continued detention of the persons in Dhaka Central Jail, in violation of their fundamental rights as guaranteed under Articles 31, 32, 35 (1) and 36 of the Constitution, and in spite of serving out the terms of their respective sentences, should not be declared to be without lawful authority and why an independent commission should not be appointed to conduct an inquiry into the matter. The Court also directed the respondents to submit a list of such prisoners. The Jail authority submitted the report and the case is still pending for final hearing.

- <u>STUDY OF MR. AKHTER HAMTD SIDDIQUL WRIT PETITION NO. 2111 OF 2009.</u>

Mr. Siddiqui, the former Deputy Speaker was arrested on 21.03.2009 in
connection with two general diaries dated 19.03.2009 and a C.R. Case No. 230/2008

order of detention was passed on 21.03.2009 by the District Magistrate and served upon Mr. Siddiqui on 21.03.2009. (Annexure-A)

grounds served on the same day 21.03.2009. (Annexure-B)

order of govt. dated 07.04.2009 under S. 3(1) for continuance of the order
for 3 months effective from 19.04.2009. (Annexurc-C)

writ petition filed under Article 120(2)(b)(i) by daughter Faria Tejeen Siddiqui, Writ Petition No. 2111 of 2009.

Rule was issued upon the govt. and writ petition was heard on 06.05.2009.

[56] 57 DLR (HCD)

judgment passed on 07.05.2009 setting aside the detention order and Mr. Siddiqui was ordered to be released forthwith.

Judicial decisions:

The grounds of detention arc vague, indefinite and without any specification of time, date and place and as a result, the detente was deprived of giving any effective representation controverting the allegations imputed again him.

31 DLR (AD), P.I Abdul Latif Mirza Vs. Govt. of Bangladesh, the principle of Mirza 's case is still in force which would be evidenced in the detention case of Mr. Hussain Mohammad Erslwd 3 BLC (AD) 1998. P. 141 (Mustafizur Rahman Vs. Bangladesh). A citizen's right to liberty is the determining factor in this sort of judicial pronouncements.

- APPLICATION OF THE JUDICIAL DECISIONS IN MR. SIDDIQNI'S CASE:

Court's observation, "having considered the grounds for detention, we find that general allegations were made against the detente without any specification of time, date and place and as such, the detente was deprived of giving any effective representation converting the allegations imputed against him. Mere pendency of a criminal case and two G.D. Entries cannot be (tie grounds far detention. Such being the state of affairs, the detente cannot be held in custody for indefinite period".

- BILKIS AKTER HOSSAIN V. GOVERNMENT[57]

Dr. Khandakar Musharraf Hossain was arrested on the ground of delivering provocative speech.

[57] 2 MLR 1997 113

Judgement:

The court held that the detention was illegal and also held that there was a non-application of mind in giving the detention order. And in this case along with three other similar petitions, detention of four political leaders was held mala fide, and illegal. For the first time, the court awarded compensation of one lakh taka to each detunes.

- MD. SEKANDAR ALI V. BANGLADESH[58]

In this petition one Md Sekander Ali, was expelled from the Degree Examination hall. The agitating expelled candidates raided the examination centre, attacked the Upazilla Nirbahi Officer and his house. Md. Sekander Ali was detained under Section 3 of the Special Powers Act, 1974. The government alleged that Md. Sekander Ali had secret sitting with the others and at his indication all others indulged in unlawful acts.

Judgment:

Declaring the detention illegal, the Court held that the law requires the Government, while detaining a person, must serve specific grounds for detention so as to enable the detente to know what his faults are so that he is in a position to make an effective representation.

[58] 42 DLR (HCD) 346

5.4 findings

It is true that most of the countries use preventive detention as a weapon to dominate, break into pieces the political parties and to eternalize the power of governing.

1. Without trail six months detention can be conferred to the detainee. This is a bad process because now here in the world such periods is not found anywhere.
2. In our country preventive detention is a method restored to in emergencies like war but the developed countries it is specifically mentioned that preventive detention is applied in time of emergency.
3. In developed countries preventive detention applied for some specific purposes but in Bangladesh it's applied both in time of peace and emergency.
4. In Bangladesh there have no specific maximum period of detention in constitution or in the special powers Act 1974, but in Pakistan preventive detention is eight months in a year[59] and in India maximum two years.
5. In Bangladesh a large number of political leader and supporters are detained without trail through the preventive detention but this types of detention is not found in other countries like Pakistan and India.
6. Many persons who are not actually criminal, being detained for wrong information.
7. Wrongfully detained persons who are rich they came outside through writ of habeas corpus in high court division but those who are poor, they have no chance.

[59] West Pakistan Maintenance of Public Order Ordinance 3(5)/
https://pakistanilaws.wordpress.com/tag/preventive-detention last visited on 28/03/2017

5.5 Recommendations

By read over the full context I find that preventive detention is an unusual measure to detain a person which is also a serious violation of personal as well as human rights of a person. Under the power of detention the detaining authority up on its flair, authority may detain any body and the law provides immunities to the authority. As a result, the authority can misuse their power.

I find the following recommendations which may help the people from the excruciate of this oppressive law.

1. There is no legal or jurisprudential necessity of enacting any new law to hold any person being detained for a period of six month without trail.
2. Article 33(4) of the constitution should be amended and the initial period of detention should be lessened from existing 60-day period
3. The scope of safeguards under Art. 33 should be extended. Detaining persons should also have the right to be produced before the magistrate within 24 hours of arrest.
4. Detention must not be for indefinite period. A maximum period for preventive detention should be inserted in the constitution.
5. The detent must be communicated the grounds of arrest within a fixed specific time, which must be laid down by law
6. All reasonable opportunities should be provided to the detent.
7. All forms of torture or inhume treatment should be avoided and for that strict rules and regulations must be made for the detaining authority.
8. The detent should not be kept with the regular convict as it is not a form of punishment for any crime.
9. The detent must be treated with honour as he has not violated any law so legal provisions should be made to force the detaining authority to be respectful.
10. Preventive detention should be used only as a last resort and for emergency period only. So necessary legal reform must be made to stop the use of preventive detention in peace time.

11. Scope of preventive detention must be curtailed and the grounds on which it could be allowed must be clearly stated down by the legislative authority.
12. All the legal statute regarding preventive detention must be scrutinized very carefully and repeal the provisions which violate the spirit of the constitution.
13. The relatives of the detent should be informed as soon as possible of the detention, so that the detent can exercise his right to representation as soon as possible.
14. A judicial review should be held to review the conditions of all the persons detained under preventive detention laws.
15. The detent must be allowed immediate and regular access to lawyer family members and unbiased medical board.
16. In case of illegal detention, the detent must be compensated adequately and the responsible party for such mistake, if not bonfire, must be brought under the law.
17. In case of interrogation all the recommendations made by the Supreme Court in various cases must be followed and a comprehensive rules and procedure should be created for the use of interrogating officers.
18. Direction and orders of any court must be given its due importance.
19. In order to ensure accountability of actions of the police authorities, the directives of the Supreme Court in BLAST vs. Bangladesh and Saifuzzaman vs. State should be implemented as soon as possible.
20. Government should restrict the use of preventive detention as much as government can.
21. To ensure the proper functioning of democratic environment and to maintain human rights, the recommendation state above should be followed.

Conclusion

The legitimacy of both the criminal and civil confinement systems depends on maintaining the distinction between them. Criminal sanctions should be imposed only on culpable wrongdoers, and civil confinement should be reserved for no responsible agents who are dangerous and for whom confinement is cost-benefit justified. Various proposals to expand preventive detention threaten to excuse blameworthy defendants and preventively to detain large numbers of responsible people who will in fact pose no danger. Desirable conceptions of responsibility will be undermined. To avoid this result, indirect preventive detention accomplished by imposing arguably deserved, lengthy sentences on convicted criminals would work, and would help maintain a clear distinction between civil and criminal confinement, but would risk imposing punishments that might be too harsh. Moreover, readily available preventive detention may cause society to ignore other, potentially fairer and more effective interventions to prevent violence. Pure preventive detention would also be unfair because sub-spatial over commitment would result. In sum, preventive detention will be unfair, expensive, and largely ineffective. Our society can devise better means to protect us.

It is proved and undisputed that the Special Powers Act of 1974 is ultra vires to human rights norms and instruments. Different governments of Bangladesh have manipulated it. Almost all the parties in power have harassed the opponent through the Act. In the regime of Awami League government during 1974-'75, of Ziaur Rahman government during 1975-'81 and of Ershad government during 1982-'90 a number of more than two lakh people were arrested and detained under this Act. During 1992 only in the month of July a number of 4,500 persons were detained under this Act. According to a report of the US State Department in 1997 a number of 3,498 persons were detained under this Act. Detention is still going on.

In the developed countries any preventive detention law may be enacted during emergency like war or foreign attack but as soon as the necessity is over the law is banned, even in some cases its duration is mentioned. The Special Powers Act of 1974 was enacted after the Indian Maintenance of Internal Security Act of 1971. But section 13 of that Indian law

was not incorporated in our Act for according to that section 13 no person could be detained for more than one year, but there is no such limitation in our Act.

The worst Acts in India commonly named as TADA Acts (a) The Terrorist Affected Areas (Special Courts) Act, 1984, (b) The Terrorists and Disruptive Activities (Prevention) Act, 1985 and (c) The Terrorists and Disruptive Activities (Prevention Act), 1987 were enacted for the purpose of containing the separatist-movement of the Sikhs of Punjab. In view of containing the freedom movement of Muslims of Jammu and Kashmir some further provisions were added thereto. But the Indian government was compelled by the criticism and pressure of the people to withdraw the Acts on 23 May 1995. Therefore the Special Powers Act may also be repealed.

It has already done a lot of admirable works. Its success in bringing tremendous changes in the social and political life of Bangladesh has raised the hope of actualizing many tasks undone by the previous governments. Therefore it is also very eagerly hoped that it shall positively take necessary action to repeal the Special Powers Act of 1974 just before handing over power to the elected government. Because it is well proved that no party-government will be willing to do it. If any government undergoes any necessity in future it might enact it again, but during peace-time this law should not prevail for it goes against human rights. If the Caretaker Government repeals the Act before handing over power to elected government the international community will know that such a law has been abolished in Bangladesh and our international relations with other countries and international organizations shall be strengthened and it would be in line with article 25(1) the Constitution of Bangladesh which provides: the State shall base its international relations on the principles of respect for international law and the principles enunciated in the United Nations Charter.

Bibliography

List of Statutes

a) Constitution of the People's Republic of Bangladesh

b) Code of Criminal Procedure, 1898

c) Special Powers Act, 1974

Books

Arif Khan, Constitution of Bangladesh (5th Edition, Bengal Law Book, 2020)

DR. S.M Hassan Talukder, Development of Administrative Law in Bangladesh: Outcomes and Prospects (Third Edition, Bangladesh Law Research Centre, 2015)

F.K.M.A.Munim, Rights of The Citizen Under The Constitution and Law (The Bangladesh Institute of Law and International Affairs, Dacca Publishers 1975)

MD. Abdul Halim, Constitution, Constitutional Law and Politics: Bangladesh Perspective (Tenth Edition, CCB Foundation: Lighting the Dark,2017)

MD. Abdul Halim, Farhana Helal Mehtab, Law and Legal English (3rd Edition, CCB Foundation: Lighting the Dark, 2015)

Mahmudul Islam, Constitutional Law of Bangladesh (Third Edition, Mullick Brothers Pulishers 2017)

Siddiqur Rahman Mia, The Special Powers Act (9th Edition, Bangladesh Law Book Company, 2018)

Journal Article

Islam, Shirajul (Ed.). (2003). Banglapedia: National Encyclopedia of Bangladesh. Dhaka, Asiatic Society of Bangladesh.

Bhuiyan, Md. Jahid Hossain. (2004). Preventive Dentation and Violation of Human Rights Bangladesh, India & Pakistan, Bangladesh. Journal of Law Vol. 8 no 1 & 2 June and December.

Chowdhury, Badrul Haider. (1990). The Long Echoes. Dhaka, Naima Haider.

Delhi Transport Corporation VS D.T.C Mazdoor Congress (1991)

Halim, Md. Abdul. (2006). Constitution, Constitutional Law & Politics, 3rd Ed. Dhaka, Human Development Foundation.

Mohsan , A. F.M. (2003). Shangbidhanik Ainer Mulnitee. Dhaka: Kamrul Book House.

Patel, T. (1993). “Personal Liberty under the constitution of India”. Delhi.
Sharifuddin, Pirzada. (1964). Fundamental Rights and Constitutional Remedies in Paikstant. Lahore: All Paikstan Legal Decision.
Sufian, Md. Ashraful Arafat. (2008). Preventive Dentation in Bangladesh: A General Discussion. Dhaka: Bangladesh Research Publications Journal, Vol-1, No-2.
Akkas, S. A, ‘Constitutional Rights against Arbitrary Arrest and Detention: The Case of Bangladesh’, (2011) Bangladesh Journal of law, (BILIA)
Bari, M.E, ‘Preventive detention laws in Bangladesh and their increased use during emergencies: a proposal for reform’ (2017) Commonwealth Law Journal, Oxford University
Faruque, A.A and Bari, F.M, ‘Arbitrary Arrest and Detention in Bangladesh’ (2019) Australian Law Journal. Vol 19